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IN THE

SUPREME COURT

OF THE

UNITED STATES

JANUARY TERM

No. 932

IN THE

SUPREME COURT

OF THE

UNITED STATES

JANUARY TERM

No._____

ARTHUR THOMAS LELLES,
Petitioner,

- VS -

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHEN V. CAREY
JOHN F. DORE
WILLIAM H. MULLEN
Counsel for Petitioner

OFFICE AND POST OFFICE ADDRESS:

STEPHEN V. CAREY
811 New World Life Building
Seattle 4, Washington

JOHN F. DORE
304 Spring Street,
Seattle 4, Washington

WILLIAM H. MULLEN
304 Spring Street
Seattle 4, Washington

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No._____

ARTHUR THOMAS LELLES,
Petitioner,

- vs -

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review judgment of the United States Court of Appeals for the Ninth Circuit, Number 15,138, entered in above cause on February 11, 1957.

CITATIONS TO OPINION BELOW

The opinion entered by the Court below is printed in Appendix B, hereto, infra, page 13.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, No. 15,138, was entered on February 11, 1957. Petition for Rehearing was filed on March 9, 1957, and an Order denying that Petition was entered by the Court below on March 19, 1957. Jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. 1254 (1). The jurisdiction of the District Court was invoked because the cause was an indictment of the Federal Grand Jury charging the Petitioner and the Cultured Mushroom Industries, Inc., with two counts of violating the Federal Food, Drug and Cosmetic Act, 21 U.S.C. Nos. 331 and 333.

QUESTION PRESENTED

In prosecuting a corporation and a corporate officer under the Act, is a corporate officer denied due process of law, where the corporation is dismissed by Judgment of acquittal after the jury has returned a verdict of guilty against each; where the only evidence was that another corporation, not charged allegedly sold and received payment, and there was no evidence of overt act of the corporate officer, save that he was president.

STATUTES INVOLVED

Statutes involved are the Federal Food, Drug and Cosmetic Act of 1938 as amended, 21 U.S.C. 331, 333 and 334 (a) (3). Pertinent portions thereof are printed in Appendix A hereto, infra, page 12.

STATEMENT

A two count indictment was filed jointly against Petitioner Lelles, and Cultured Mushroom Industries, Inc., of which he was alleged to have been president at the time, charging them with unlawfully causing to be introduced and delivered in interstate commerce several cases of adulterated cultured mushroom salt, in violation of the Act. A motion to dismiss indictment and for a directed verdict was made by defense counsel during trial, prior to submission to the jury, which motion was taken under advisement. On return of a jury verdict of guilty of both defendants on both counts, the trial judge granted an order for judgment of acquittal as to Cultured Mushroom Industries, Inc., and sentenced Petitioner Lelles to eighteen months imprisonment on each count, to be served concurrently.

The Court below, upon appeal by Petitioner Lelles, affirmed the conviction, largely on the basis of authority of *United States* v. *Dotterweich*, (1943) 320

U.S. 277, which case was an opinion of a divided court, reversing the Court below.

In the lower court proceedings, in contrast to the Dotterweich case, the jury did not acquit the jointly charged corporation. It was the Judge who did so, because of legally insufficient evidence. But the judge did not do so, however, until the jury returned a verdict of guilty of both defendants on both counts.

REASONS FOR GRANTING WRIT

I

The decision of the Court below deprived Petitioner of his rights under the due process clause of the Fifth Amendment of the United States Constitution. It violated his rights to substantive due process by upholding and affirming a conviction of a corporate officer without evidence of any act of aiding and abetting commission of a crime; but merely imposing a vicarious guilt, by reason of holding a corporate office in an offending corporation. It violated his rights to procedural due process, and a fair trial, by reserving a motion to acquit until after the jury returned a verdict of guilty of both defendants, and then, entering judgment of acquittal as to the corporation. The Court below further misconstrued and misapplied the Dotterweich case, which involves a

different point of law, and concerns fundamentally different facts.

1. While granting arguendo that if a corporate officer himself "causes" the acts denounced by the statute, he might be guilty of violating the Act, still, under basic concepts of evidence, under the Fifth Amendment to the United States Constitution, there must be some evidence of the act of "causing". In other words, it is suggested that there must be at least a prima facie case of aiding and abetting.

In the instant case the corporation of which Petitioner was president was acquitted by Judgment, (not by verdict, and not until after the jury deliberated and returned a verdict). The defendant corporation was acquitted by judgment because the only evidence introduced by the Government indicated that some of the acts and things alleged of the corporation, in the indictment, were actually done by a third corporation, which was not named in the indictment. It so happened that Petitioner was president of that other corporation (*i.e.*, Washington Mushroom Industries, Inc.). But the evidence, so far as it went, did not show that the Petitioner actually did anything save act as president.

Accordingly, the effect of the Decision of the Court below in affirming the judgment of the District

Court, is to impose a vicarious guilt on any corporate officer, despite a total failure of proof that he did anything in connection with the acts of the charged corporation. This is not only contrary to the wording of the Act itself, which expressly requires a showing that the individual either "did or caused to be done" the acts and things denounced; but, the concept of law here upheld is to render nugatory ancient and fundamental requirements of due process, including proof of guilt and presumption of innocence. The purport of this philosophy or view of the law, is to do away with evidence and reasonable doubt, in substitution for vicarious guilt. Refined a little more, the effect of the decision of the Court below is to pronounce that being an officer of an allegedly offending corporation is prima facie evidence of criminal acts. It is suggested that this decision of affirmance would just as well support a conviction of the vice president or any corporate officer. This petitioner was convicted without proof of any overt act, under any standard, save that of being a corporate officer.

In the Dotterweich case the Court stated that the only way a corporation can act is through individuals who act on its behalf. In that case, however, there was evidence that the Defendant and Petitioner actually had acted for the Corporation which was acquitted by jury. In the instant case there was no evidence that

the Defendant and Petitioner did anything in connection with the acts and things introduced, save be president at the time. Thus, on the basis of the evidence introduced, the Government failed to prove a case against the Defendant Corporation, and the Court therefore dismissed it by judgment. despite the verdict. That was not true in the Dotterweich case. There, the jury did so, which as Justice Frankfurter pointed out "Juries may indulge in precisely such motives or vagaries",*United States* v. *Dotterweich (supra)*. But judges can not, and should not.

2. As to procedural due process, conceding that the Federal Rules of Criminal Procedure permit a judge to allow himself the luxury of letting a case go to the jury, despite a total lack of evidence; nevertheless that constitutes an abuse of discretion in cases of this kind, involving joint defendants, where each is so inter-related with the other that the jury might foreseeably consider that the guilt of one depends on the guilt of the other. Accordingly, had the judge foreseen, and it was reasonable to so foresee, that the jury would have found Petitioner guilty, providing the jury found the corporation guilty, (because the Petitioner was officer thereof), then, he should have protected the Petitioner's rights to fair trial, and, procedural due process, by dismissing the corporation prior to submission. In other words, assuming there

was no evidence of corporate guilt, as indeed there was not, then it is suggested that to reserve judgment under the circumstances constituted such an abuse of discretion as to deny Petitioner procedural due process. The trial judge could well have foreseen, that the jury might not have found Petitioner guilty, had it known that the corporation was not guilty as a matter of law. Parenthetically, it is submitted, that the Federal Rules of Criminal Procedure are just as subordinate to the Constitution of the United States, as are statutes of the Congress. And the application of a valid rule in some case, as notably this, might if applied indiscreetly, or without prudence, do the reverse of protecting the rights of parties litigant. In the instant case, while assuming a jury be entitled to indulge in "vagaries", *United States* v. *Dotterweich, (supra)*, still, a judge should exercise discretion to avoid that consequence, rather than aggravate the possibility. See: Rule 29(a) Federal Rules of Criminal Procedure; and Rule 29(b) Federal Rules of Criminal Procedure.

II

The Dotterweich case is fundamentally different from the cause at bar. In that case, the ruling simply was that there is not an inconsistency in having a jury dismiss a corporation, and find guilty its president. In the instant case, the jury did not do this. It found

both defendants guilty, and thereafter the judge dismissed the corporation, allowing the verdict to stand against Petitioner, and imposing two eighteen month sentences against him, (concurrently).

Further, in the Dotterweich case the Court held in passing that a corporate officer of a Defendant corporation is an individual within the purview of the act, and that the only way a corporation can act is through individuals acting on its behalf. In the instant case the corporation was dismissed, as a matter of law, and therefore, the dismissal was tantamount to a ruling that the corporate officers could have done no act, because the corporation did not. Accordingly, if the trial court ruled as a matter of law that the corporation did nothing, certainly, the individuals acting corporately, could have done nothing in connection therewith. This is different from having a jury decide the matter.

In fact, it is submitted that the Dotterweich case, if properly construed, is authority for the reverse proposition of the decision of the Court below. United States v. Dotterweich (supra) at p. 284:

> "Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial, and its submission — *assuming the evidence warrants it*—to the jury under appropriate guidance.

Here, the lack of evidence of malefaction of Cultured Mushroom Industries, Inc., as a matter of law, as ruled by the trial judge served, by that ruling to exonerate Petitioner. Here, it is suggested, the evidence relating to acts done by Washington Mushroom Industries, Inc., (which was not a party, but of which the Petitioner was also president), was silent as to Petitioners actual acts, overt acts, in connection therewith, save that he was president.

CONCLUSION

By way of conclusion, therefore, it is respectfully urged that the effect of the decision of the court below was to deprive the Petitioner of due process of law, both substantively and procedurally, as guaranteed by Amendment V, United States Constitution; and to misconstrue and misapply the tenor of United States v. Dotterweich (supra). That substantive due process was denied follows from the fact that the Court below allowed conviction to stand without any evidence of an overt act, save the constitutional questionable reason that Petitioner was a corporate officer of a corporation not charged, which was linked to the wrongful acts by the evidence. That procedural due process was denied follows from the dismissal and acquittal by judgment of the Court, only after the jury returned its verdict, which, it is submitted, constituted an in-

discreet misleading of the jury by the trial court. The Dotterweich case, being based on distinctly different facts, and ruling on a different point of law, was erroneously relied upon by the Court below; whereas that case would have supported a reverse proposition by virtue of the language to the effect that while a corporate officer may be personally guilty, still, that fact depends on evidence produced, and submitted under appropriate instruction. This court should reconsider the Dotterweich case and should either overrule it or definitely limit and define its standards.

Respectfully submitted,

STEPHEN V. CAREY
JOHN F. DORE
WILLIAM H. MULLEN
Counsel for Petitioner.

APPENDIX A

STATUTES

28 USC 331 PROHIBITED ACTS

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded.

28 USC 333 PENALTIES—

VIOLATION OF SECTION

(a) Any person who violates any of the provisions of Section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1000, or both, such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

28 USC 342 (a) (3) ADULTERATED FOOD

A food shall be deemed to be adulterated—

(a) . . . (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; . . .

APPENDIX B
(Corrected)

OPINION AND JUDGMENT BELOW

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARTHUR THOMAS LELLES, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 15,138 Feb. 11, 1957

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Before: BONE, CHAMBERS and HAMLEY, Circuit Judges

BONE, Circuit Judge

Appellant Lelles and Cultured Mushroom Industries, Inc., were charged in a two count indictment with unlawfully causing to be introduced, and delivered for introduction, into interstate commerce at Seattle, Washington, for delivery to persons in Iowa (count 1) and Wisconsin (count 2) a number of cartons containing "cultured mushroom salt," said food being adulterated within the meaning of 21 U.S.C.A. §342(a)(3), "in that it consisted in part of a filthy substance by reason of the presence in said food of

insect larvae and insect fragments," all in violation of 21 U.S.C.A. §§331 and 333. In a trial to a jury both Cultured Mushroom Industries, Inc., and Lelles were found guilty on both counts.[1]

Arthur Thomas Lelles vs.

A motion by Cultured Mushroom Industries and Lelles for a new trial was denied, but the trial judge entered an order for judgment of acquittal as to Cultured Mushroom Industries. A motion to dismiss the indictment and to direct the jury to return a verdict of not guilty was made during the trial and before submission of the case to the jury, and was taken under advisement by the trial judge. Lelles was sentenced to 18 months imprisonment on each count, to be served concurrently, and was fined $1000 on each count.

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[1] The indictment also charged a previous conviction. Counsel for appellant and for Government stipulated "* * * that on August 7, 1950, Cultured Mushroom Industries, Inc., and Arthur Thomas Lelles, defendants herein, were convicted upon a plea of Guilty in this Court of Violation of the Federal Food, Drug, and Cosmetic Act in Criminal Cause No. 47976, and that said conviction had become final before the violations alleged in Counts I and II of the Indictment herein were committed." 21 U.S.C.A. §333 provides for more severe penalties if the person has previously been convicted.

This Court also affirmed a conviction of Lelles for using the mails to defraud. Lelles v. United States, 1941, 9 Cir., 120 F. 2d 447.

From this judgment Lelles brings this appeal.

We first consider appellant's contention that the lower court erred in submitting to the jury the case as to both the corporation and individual. It is claimed that this was a misjoinder of parties defendant.[2] During the trial, evidence showed that the shipments here involved were made by Washington Mushroom Industries, Inc. (not a party to the proceeding), and that payment for the mushroom salt was also made to Washington Mushroom Industries, Inc.[3] At the close of all the evidence, both defendants moved for a directed verdict of not guilty[4] and for a dismissal of the

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[2] Federal Rules of Criminal Procedure, Rule 8(b) provides for joinder of two or more defendants. Rule 14 provides for relief from prejudicial joinder. No relief was sought before or during the trial, nor in the motion for a new trial. It appears to have been first raised in statements of points to be relied upon on appeal. We believe this amounts to a waiver of objection. Rule 12(b)(2). Cf Smith v. United States, 1950, D.C., 180 F. 2d 775.

[3] Testimony shows that appellant owns all the shares but two "qualifying" shares in both Washington Mushroom Industries, Inc., and in Cultured Mushroom Industries, Inc. The business address and place of doing business of each is the same. Appellant is president of each corporation.

[4] Federal Rules of Criminal Procedure, Rule 29(a), "Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their

indictment. The trial judge denied the motion as to appellant, but reserved ruling as to the corporation defendant.[5] Following return by the jury of a verdict of guilty as to both defendants, the trial judge entered an order acquitting the corporation.

It is appellant's argument that "* * * if the corporation of which this individual is President did not make the shipment, and the Court so found by dismissing the action, then its President is not guilty." It seems to be appellant's position that he cannot personally be liable as he did not ship the adulterated food in interstate commerce; that he can be liable only as an officer of the corporation that did ship the food, and since the corporation charged in the indictment was granted its motion for acquittal, the appellant, as president, cannot be guilty. Appellant then argues the portion of the indictment which refers to himself

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place." In considering appellant's argument we have treated his motion for a directed verdict as if it were a motion for judgment of acquittal.

[5] Federal Rules of Criminal Procedure, Rule 29(b) reads, "If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. * * *"

(Lelles) is merely descriptive of his official position with Cultured Mushroom Industries. We disagree with this argument.

We believe the import of the statute, 21 U.S.C.A. §331, and of the case of United States v. Dotterweich, 1943, 320 U.S. 277, is that a person who has responsibility in the business activities of a corporation may be personally guilty. The statute, 21 U.S.C.A. §331, reads, "The following acts *and the causing thereof* are hereby prohibited * * *." (Emphasis supplied.) It would seem from reading this statute that if a person causes the unlawful introduction of adulterated food into interstate commerce, such person is guilty.[6]

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[6] 21 U.S.C.A. §333(a) provides, "Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor * * *."
21 U.S.C.A. §321(e) provides, "The term 'person' includes individual, partnership, corporation, and association."

21 U.S.C.A. §331 provides, "The following acts and the causing thereof are hereby prohibited: (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

21 U.S.C.A. §342 provides, "A food shall be deemed to be adulterated—(a)(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; * * *."

In United States v. Dotterweich, supra, at p. 284, the Court stated:

> "* * * To speak with technical accuracy, under §301 [of the Act, 21 U.S.C.A. §331] a corporation may commit an offense and all persons who aid and abet its commission are equally guilty. Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission — assuming the evidence warrants it — to the jury under appropriate guidance. *The offense is committed*, unless the enterprise which they are serving enjoys the immunity of a guaranty, *by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws*, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. * * *" (Emphasis supplied.)

We have carefully examined the indictment and believe that it charges appellant personally to have caused unlawfully to be introduced and delivered for introduction into interstate commerce the adulterated food. We quote the relevant portions of the indictment in the margin.[7] We disagree with appellant that the

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[7] "The Grand Jury charges: * * * That Cultured Mushroom Industries, Inc., a corporation organized and existing under the laws of the State of Washington and trading and doing business at Seattle, State of Washington, and Arthur Thomas Lelles, an individual, at the time hereinafter mentioned president of said corporation, did, within the Northern Division of the Western District of Washington, on or

entire portion "* * * and Arthur Thomas Lelles, an individual, at the time hereinafter mentioned president of said corporation * * *" is descriptive only. We believe when it reads, "* * * Lelles, an individual * * *" that it charges Lelles personally as "an individual" to have done an unlawful act.

Appellant's contention that he may be guilty only as the officer of a guilty corporation is answered by the opinion in United States v. Dotterweich, supra. In that case the indictment charged the corporation and its president and general manager, Dotterweich, for violations of 21 U.S.C.A. §331(a). The jury did not find the corporation guilty but did find Dotterweich guilty. At p. 279 the Court stated:

> "* * * Equally baseless is the claim of Dotterweich that, having failed to find the corporation guilty, the jury could not find him guilty. Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial * * *."

We believe there was no prejudicial error in sub-

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about February 10, 1955, in violation of the Federal Food, Drug, and Cosmetic Act, unlawfully cause to be introduced and delivered for introduction into interstate commerce at Seattle, State of Washington, for delivery * * *."

mitting the case to the jury as against both corporation defendant and individual defendant. The evidence sufficiently shows that appellant Lelles was a responsible official. (See footnote 3, supra.) Cf. Golden Grain Macaroni Co., Inc. v. United States, 1953, 9 Cir., 209 F. 2d 166, 168.

Appellant next argues that the motion to dismiss the indictment should have been granted because of variance between an allegation in the indictment and the proof. On this point he argues that the indictment, count 1, charges appellant with causing a certain unlawful interstate commerce shipment (to Iowa) to be made "* * * on or about February 10, 1955." According to the records of the appellant, this shipment was made on January 22, 1955, or 19 days before the alleged date. As a general rule, a difference between the date charged in the indictment and the date shown by the evidence at trial is not fatal to the prosecution. In Ledbetter v. United States, 1898, 170 U.S. 606, 612, the Court stated:

> "Neither is it necessary to prove that the offense was committed upon the day alleged, unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient."

And this Court stated in Berg v. United States, 1949, 176 F. 2d 122, 126, cert. den., 1949, 338 U.S. 876:

> "Even if it be true that the date alleged for the commission of a crime is not a true one or even a possible one, this does not invalidate the indictment. The change of a date in an indictment is not a material allegation which must be proved as laid."

Appellant alleges error by the lower court in permitting appellee to recall certain witnesses for rebuttal and to call a witness for the first time during appellee's case in rebuttal. As part of his defense appellant sought to prove that the mushroom salt in these shipments was made several years prior to the shipments here involved and had been approved by food inspectors in 1950, and that no mushroom salt had been made since that time. In its opening case, appellee had anticipated this defense and sought to show that mushroom salt had been made about the time of the shipments involved in this action. At this time, the trial judge asked, "Are you seeking, or anticipating the Defendant's defense here?" Following an affirmative reply by appellee's counsel, the trial judge stated, "It seems to me that that is rebuttal." Appellee thereafter ceased to offer such evidence until after appellant completed his case.

It is appellant's contention that the testimony offered by appellee in rebuttal was improper rebuttal evidence and that it should have been introduced during appellee's case in chief. Questions of rebuttal testimony are generally subject to the sound discretion of the trial court. In Cornes v. United States, 1941, 119 F. 2d 127, 130, this Court stated:

> "Appellant contends that certain evidence which was offered in rebuttal, and was admitted, should have been excluded as not being proper rebuttal. Assuming, without deciding, that it was not proper rebuttal, it was nevertheless within the discretion of the Court to admit the evidence; and that discretion, in the absence of abuse, is not reviewable. Goldsby v. United States, 160 U.S. 70 [1895] * * *."

See also Marron v. United States, 1925, 9 Cir., 8 F. 2d 251, 257; Samish v. United States, 1955, 9 Cir., 223 F. 2d 358, 365, cert. den., 1955, 350 U.S. 848, rehearing den., 350 U.S. 897; Williams v. United States, 1945, 4, Cir., 151 F. 2d 736; Labiosa v. Government of Canal Zone, 1952, 5 Cir., 198 F. 2d 282; United States v. Hiss, 1950, 2 Cir., 185 F. 2d 822, cert. den., 1951, 340 U.S. 948. We believe there was no abuse of discretion.

On rebuttal a witness for appellee testified that in his opinion, based on samples analyzed in 1950

from mushroom salt identified as lots 102 and 103, and an analysis of samples from the 1955 shipments here in issue, the mushroom salt analyzed in 1955 could not be from the same stock as the mushroom salt analyzed in 1950. He expressed this opinion because the two samples varied so in contents.[8] Appellant argues that admission of this testimony was error as it was opinion testimony relating to an ultimate fact properly to be determined by the jury. We disagree. The testimony of the witness did not relate to the ultimate issue involved, which was whether the food introduced in interstate commerce in 1955 was adulterated, but related to whether the 1955 sample came from the same stock as the 1950 sample. We also disagree for the reason that the witness was an expert with specialized skill in chemistry. He examined mush-

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[8] The 1950 and 1955 samples showed the following:

1950 Samples

(1) No appreciable filth
(2) Appreciable amount of cornstarch
(3) Net weight per can—.09 oz.
(4) Headspace per can—2¾ in. to 35/6 in.

1955 Samples

(1) Substantial filth
(2) A few grains of starch—not enough to permit identification as cornstarch
(3) Net weight per can—from 1.63 oz. to 1.82 oz.
(4) Headspace per can—1⅜ in. to 1⅝ in.

The appreciable filth included whole larva and large beetle fragments, small fragments, and rat or mouse hairs.

room salt samples in 1950 and other samples in 1955. The competency and qualifications of a witness offered as an expert, and the extent to which his opinion may be required, are matters largely within the judicial discretion of the trial judge. Reuter v. Eastern Air Lines, Inc., 1955, 5 Cir., 226 F. 2d 443, 445; Hatch v. United States, 1929, 8 Cir., 34 F. 2d 436, 437, cert. den., 1930, 281 U.S. 731; United States v. Kolodny, 1945 2 Cir., 149 F. 2d 210; Landfield et al. v. United States, 1925, 9 Cir., 9 F. 2d 315, 316. While the witness did state facts about the contents of the 1950 and 1955 samples, we do not believe the trial court abused its discretion in permitting the witness to express his opinion based on many years of scientific analysis of food.

Appellant also contends that the trial court erred in refusing to sustain appellant's challenge to the legal sufficiency of the evidence and in refusing to direct a verdict of not guilty. We have examined the entire record on appeal and are convinced that there was sufficient evidence to carry the case to the jury and that the evidence was substantial and supports the verdict.

Judgment Affirmed.

(Endorsed:) Opinion. Filed Feb. 11, 1957. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARTHUR THOMAS LELLES, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 15138.

JUDGMENT

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and Entered: February 11, 1957
Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 922

ARTHUR THOMAS LELLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 13-24) is reported at 241 F. 2d 21.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1957 (Pet. 25), and a petition for rehearing was denied on March 19, 1957 (R. 111). The petition for a writ of certiorari was filed on

April 18, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence that petitioner was president, controlling stockholder, and active manager of a corporation which caused the shipment in interstate commerce of adulterated foodstuff was sufficient to sustain his conviction under Section 303 of the Federal Food, Drug, and Cosmetic Act.

2. Whether the trial court abused its discretion under Rule 29(b) of the Federal Rules of Criminal Procedure in reserving ruling on a motion for a judgment of acquittal as to the corporate co-defendant until after the jury returned a verdict.

STATUTE INVOLVED

The pertinent portions of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 1042, 1043, 21 U.S.C. 301, 331, 333, are as follows:

PROHIBITED ACTS

SEC. 301. The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

* * * *

PENALTIES

SEC. 303. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction there-

of be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

STATEMENT

In the District Court for the Western District of Washington, a two-count indictment was returned against the Cultured Mushroom Industries, Inc., a corporation, and petitioner, "an individual, at the time hereinafter mentioned president of said corporation" (R. 3, 4). The indictment charged that on January 31, 1955, and February 10, 1955, the defendants did unlawfully cause to be introduced and delivered for introduction into interstate commerce cartons of adulterated mushroom salt, bearing the name of the corporation, for delivery to certain named persons in violation of 21 U.S.C. 331 and 333 (R. 3-6). A jury found both the corporation and petitioner guilty (R. 6). Petitioner received a total sentence of eighteen months and a total fine of $2,000 (R. 10-12).[1] On appeal, petitioner's conviction was upheld (Pet. 25).

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[1] The sentence was in accordance with the provisions of 21 U.S.C. 333 (*supra*, p. 2) which provide a heavier penalty in the case of those who have been previously convicted under this statute. It was stipulated that petitioner and Cultured Mushroom Industries, Inc., had been so convicted on a plea of guilty on August 7, 1950 (R. 7).

It was uncontroverted that the corporate defendant, Cultured Mushroom Industries, manufactured the mushroom salt here in issue, that it was shipped in containers bearing the name of the Cultured Mushroom firm, but that another corporation, Washington Mushroom Industries, Inc., actually made the shipments and received payment (R. 57-58, 91-94). Petitioner admitted that he was president of both companies, that they did business at the same address, that he owned ninety-eight out of one hundred shares of stock of both, and that they were, in fact, his companies (R. 57-58, 61). A holder of one of the other shares, and an officer of the Cultured Mushroom firm, testified that petitioner actively managed both companies (R. 48).

At the close of the evidence, petitioner and the corporate defendant moved for a dismissal of the indictment and a directed verdict of not guilty on the ground of the insufficiency of the evidence (R. 91-92). The motion was overruled as to petitioner (R. 94). As to the corporate defendant, the court reserved its ruling, in accordance with Rule 29(b) of the Federal Rules of Criminal Procedure, and commented that it regarded as weak the government's argument that, while Washington Mushroom Industries made the shipment, it did so merely as sales agent of the Cultured Mushroom firm, and since petitioner controlled both firms, Cultured Mushroom could be considered to have "caused" the shipment as alleged in the indictment (R. 93-94).

After the guilty verdict as to both petitioner and the Cultured Mushroom corporation, the court granted

a judgment of acquittal as to the corporate defendant (R. 9-10).

ARGUMENT

1. Petitioner argues that the evidence of his presidency of the corporation which shipped adulterated foodstuff in interstate commerce is insufficient to support his conviction under the Federal Food, Drug, and Cosmetic Act (*supra*, pp. 2-3) which provides criminal sanctions for any person who, *inter alia*, causes such a shipment (Pet. 5-7, 10).

This Court in *United States* v. *Dotterweich*, 320 U.S. 277, 284-285, held that the criminal sanctions of those sections of the Federal Food, Drug, and Cosmetic Act involved here (which do not require wilfulness) apply to corporate officers who have a "responsible share" in putting into the stream of interstate commerce adulterated drugs, foods or cosmetics. While it did not undertake to delineate precisely the class of persons who stand in such a responsible position, the facts of the *Dotterweich* decision, where the evidence was held sufficient to support the verdict against the individual, furnish a guidepost here. As the dissent in *Dotterweich* noted, there was no proof that Dotterweich actively participated in the shipping of the adulterated drugs in question, beyond proof that he was president and general manager of the firm. 320 U.S. at p. 286. Petitioner concedes here that he was the president of the offending corporation. The evidence shows that, in addition, he was the controlling stockholder and active manager. In effect, both corporations involved were no more than petitioner's *alter ego*. Petitioner said, "They

are, in fact, my companies" (R. 57). Thus, under the *Dotterweich* decision, the evidence against petitioner was ample to sustain the jury verdict that he had "caused" the shipment. Cf. *Golden Grain Macaroni Co.* v. *United States*, 209 F. 2d 166, 168 (C.A. 9).

Petitioner's position, that he is not guilty as a corporate officer if the corporation charged in the indictment did not cause the shipment (Pet. 9), rests upon the assumption, which the Court of Appeals expressly overruled (Pet. 18-19), that the indictment did not charge petitioner individually with the unlawful acts. The indictment clearly charged petitioner as an individual, although noting that he was president of the corporate defendant named in the indictment. The fact that the wrong corporation was named, and for that reason the named corporation was acquitted, does not excuse petitioner from individual liability for his acts as president and manager of the corporation which actually did the shipping. Under *Dotterweich*, the individual responsible officer is liable, regardless of the verdict as to the corporation for which he acts. So here, petitioner was individually liable for the wrongful acts although Washington Mushroom Industries, Inc., the corporation which did the shipping, was not named in the indictment.

2. For the same reasons, petitioner's argument that he was prejudiced by the joint submission to the jury of the issue of his guilt and that of the named corporate defendant is untenable. Petitioner makes no argument that the jury was not correctly

charged as to the personal responsibility of corporate officers under the statute. Under proper instructions, if the jury found (as it did) that the food was adulterated, it would, in view of petitioner's admission of complete control of Washington Mushroom Industries, Inc. (R. 57-58), be bound to find petitioner guilty, even if it knew that the Cultured Mushroom firm, in legal contemplation, did not cause the shipment.

The action taken by the trial court was in exact accord with the provisions of Rule 29(b) of the Federal Rules of Criminal Procedure. The same argument, that a co-defendant should have been dismissed before the case went to the jury, was held to be without merit by the Third Circuit in *United States* v. *Griffin*, 176 F. 2d 727, 728, certiorari denied, 338 U.S. 952.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
ISABELLE R. CAPPELLO,
Attorneys.

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